



## **Court of Appeal (Criminal) Amendment Rules 2010**

Anand Satyanand, Governor-General

### **Order in Council**

At Wellington this 26th day of July 2010

Present:

His Excellency the Governor-General in Council

Pursuant to section 51C of the Judicature Act 1908 and section 409 of the Crimes Act 1961, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council and, as far as the rules regulate the practice and procedure of the Court of Appeal in the exercise of its jurisdiction conferred by the Judicature Act 1908 and the Crimes Act 1961, with the concurrence of the Right Honourable the Chief Justice and at least 2 other members of the Rules Committee (of whom at least 1 was a Judge of the High Court), makes the following rules.

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## Rules

- 1 Title**

These rules are the Court of Appeal (Criminal) Amendment Rules 2010.
- 2 Commencement**

These rules come into force on 1 September 2010.
- 3 Principal rules amended**

These rules amend the Court of Appeal (Criminal) Rules 2001.
- 4 New rule 12A substituted**

Rule 12A is revoked and the following rule substituted:

**“12A Complaint against trial counsel**

“(1) If a ground of appeal is that there was a miscarriage of justice because of the conduct of the appellant’s counsel at the trial or sentencing (**trial counsel**), particulars of the conduct concerned must be given in—

  - “(a) the notice of appeal; or
  - “(b) a memorandum to be filed and served by the appellant within 30 working days after filing the notice of appeal.

“(2) The appellant must, within 30 working days after filing the notice of appeal, file and serve on the prosecutor any affidavits that relate to the ground of appeal.

“(3) The prosecutor must file and serve any affidavit in reply within 15 working days after the service of the appellant’s affidavit.

“(4) A party who wishes to cross-examine a deponent who has sworn an affidavit on behalf of the other party must, within 15 working days after service of the affidavit, file and serve on the other party a notice of cross-examination specifying the deponent the party wishes to cross-examine.

“(5) A party on whom a notice is served under subclause (4) must—

  - “(a) immediately advise the deponent that he or she is required for cross-examination; and

- “(b) advise the deponent of the hearing date of the appeal as soon as it is known; and
- “(c) ensure that the deponent is present at the hearing for cross-examination.
- “(6) If the appellant wishes to waive privilege under section 65 of the Evidence Act 2006 in respect of communications between the appellant and trial counsel, the appellant must, within 30 working days after filing the notice of appeal, provide to the prosecutor a written waiver of privilege in respect of all communications of that kind.”

Rebecca Kitteridge,  
Clerk of the Executive Council.

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### **Explanatory note**

*This note is not part of the rules, but is intended to indicate their general effect.*

These rules, which come into force on 1 September 2010, amend the Court of Appeal (Criminal) Rules 2001. The rules substitute a *new rule 12A*, which deals with complaints against trial counsel.

The substituted rule 12A is a response to the Court of Appeal’s decision in *R v E* [2009] NZCA 554.

It revises the procedure applicable when an appellant complains about the conduct of his or her counsel at the trial. Such an appellant may waive privilege in respect of communications before, or during, the trial with his or her then counsel. Trial counsel cannot give evidence to explain the conduct complained of without a waiver. The substituted rule removes the compulsion to file a written waiver, and recognises a choice to waive, or not to waive, privilege.

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**Court of Appeal (Criminal) Amendment  
Rules 2010**

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Issued under the authority of the Acts and Regulations Publication Act 1989.

Date of notification in *Gazette*: 29 July 2010.

These rules are administered by the Ministry of Justice.

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